payment of the debts. In the view of the Chief Justice the defendants were not chargeable with the knowledge of the trustee because he was in the midst of a course of embezzlement from them and the payments were made in his own interest to prevent the discovery of his crime. *Case* v. *Hammond Packing Co.,* 105 Mo. App. 168, 79 S. W. 732; *Arey* v. *Hall,* 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232; *Spooner* v. *Thompson,* 48 Vt. 259; *Eggleston* v. *Mason,* 84 Ia. 630, 54 N. W. 1.

WASTE—NO PHYSICAL INJURY TO PREMISES.—Action of tort in the nature of waste by the mortgagee of certain real estate against the tenants. The tenants, acting as members of a board of health, leased the premises of the mortgagor, the same to be used as a hospital for smallpox patients. Plaintiff did not know of the lease, nor of its occupation by the defendants until after it had continued for several months. *Held,* plaintiff could recover any material diminution in the value of his property, which was a question for the jury to decide, having in view all the facts, the effect of such use upon its future rental value, etc., but excluding all sentimental or fanciful notions affecting only its reputation. *Delano* v. *Smith et al.* (1910), — Mass. —, 92 N. E. 500.

This case presents a very good illustration of the manner in which the ancient idea of waste has given way under modern conditions. In early English history waste was applied almost entirely to farm lands, 2 Bl. Com. p. 281, and, as in the case of *Pratt* v. *Brett,* 2 Madd. 62, the test applied was good husbandry. In that case an injunction was allowed to restrain a tenant from year to year from sowing the land with mustard seed. But in *Richards* v. *Torbert,* 3 Houst. (Del.) 172, it was held that ill husbandry was not necessarily waste, and a tenant, who was charged with tilling a lot three years in succession with Indian corn, was not held for waste. Under modern decisions the test by which waste is determined is whether there has been a diminution of the value of the inheritance which is a question of fact for the jury to decide. *Webster* v. *Webster,* 33 N. H. 18; *McGregor* v. *Brown,* 10 N. Y. 114; 1 WASHBURN, REAL PROP., Ed. 5, p. 153. The principal case applies this rule to those cases where there has been no physical injury to property, but still the inheritance has been prejudiced, and it is supported by the case of *Hersey* v. *Chapin et al.,* 162 Mass. 176, 38 N. E. 442, which held that an owner of land who is not in possession and has no right of possession may maintain an action for the injury to his reversion, if it appears that the use of the house as a smallpox hospital diminished its rental value. However, it was held in *Miller* v. *Forman,* 37 N. J. L. 55, a case where the premises were allowed to become filthy and were also used for purposes of prostitution, and in *Brown* v. *Broadway etc. Realty Co.,* 131 App. Div. 780, in which the roof of a leased building was used for advertising purposes, that as a matter of law such use did not amount to waste since no permanent injury to the inheritance resulted therefrom.

WILLS—CONSTRUCTION—ESTATE GRANTED—"WITHOUT ISSUE."—Testator devised his estate to his two sons, share and share alike, and in case of the death of either without issue, then the estate devised to him to go to the

survivor and in case of the death of both without issue, to others. *Held*, the words "death without issue" should be construed to mean "death without having had issue" and not "death without living issue." Having had issue born to them, the sons took the property devised in fee, *Kendall* v. *Taylor* (1910), — Ill. —, 92 N. E. 562.

The words "die without issue" are construed, where uninfluenced by other parts of the will, to import an indefinite failure of issue; that is, a failure, not upon the death of the first taker, but when all of his issue or descendants shall cease. *Anderson* v. *Jackson*, 16 Johns 381, *Kent* v *Armstrong*, 6 N. J. Eq. (2 Halst.) 637, 2 JARMAN, WILLS 417, 424; *Harris* v. *Smith*, 16 Ga. 545; *Paterson* v. *Ellis' Exec'rs.*, 11 Wend. 259; *Hayward* v. *Howe*, 12 Gray 49. Where, however, it can be gathered from the context that the testator intended a definite failure of issue, the court will so construe the words and slight circumstances are often seized upon as showing such intent. In the principal case, the use of the word "survivor" clearly indicates that a definite failure was here intended. *Cutter* v. *Doughty*, 23 Wend. 512; *Gray* v. *Bridgeforth*, 33 Miss. 312. Must such issue survive the first taker? If the usual meaning is to be given the words, an affirmative answer is inevitable, but the law, in its anxiety to secure a vesting of the estate as soon as possible, gives the words a strained meaning and includes within the words any issue born to the first taker, whether or not they survive him. Statutes have settled the meaning of the phrase in several of the states—some only go so far as to declare that a definite failure is always imported by it, others give it the construction given it in the principal case. Of the latter class, are Maryland, (Pub. Gen. Laws) 1888, p. 275, Art. 21, § 83; Massachusetts, Rev. Laws 1902, p. 1268, c. 134, § 5. Illinois and Vermont have established the same rule by their decisions. *Field* v. *Peeples*, 180 Ill. 376; *Chapin* v. *Doty*, 60 Vt. 712. The general rule in the states is that the phrase means "without issue living at the death of the first taker." *In re New York, L. & W. Ry. Co.*, 105 N. Y. 89; *Mendenhall* v. *Mower*, 16 S. C. 303; *Gray* v. *Bridgeforth*, supra. In the case last cited, the court quotes from "a very sensible writer" language to "characterize the incongruities and inconsistencies of the common law on this subject as follows: "A fee cannot be limited upon a fee" says contingent remainder. "Yes it can," says executory devise. "A freehold cannot be made to commence in the future," says the former. "Oh, but it can," says the latter. "An estate to A. B. for life, remainder to his heirs means," one would say, "that the first taker shall only have a life-estate." "Not at all," answers the rule in Shelley's case; "it means he shall have the fee and cuts off his heirs without a shilling." "So a remainder to C. D. on A. B.'s dying without issue means," say grammar, language and common sense, "issue living at the death of A. B." "Not a bit of it," says common law, "it means dying without issue at any time, a hundred, a thousand years hence; and thus through A. B. has actually died without any issue at all, poor C. D's estate is void, because it depends on the indefinite failure of issue." *Kennedy* v. *Kennedy*, 29 N. J. L. 185; *Cutter* v. *Doughty*, supra; *Lewis* v. *Claiborne*, 13 Tenn. 369.